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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CANADIAN TRANSPORT COMPANY,
CLIPPER MARITIME CO., LTD.,
and ULTRAOCEAN, S.A.,
Petitioners,
vs.
HERCULES CARRIERS, INC.,
as owner of the M/V Summit Venture,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION

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QUESTION PRESENTED

WHETHER THIS COURT SHOULD REEXAMINE THE DECISION IN *ROBINS DRY DOCK & REPAIR CO. V. FLINT*, 275 U.S. 303, 48 S.CT. 134, 72 L.ED. 290 (1927), WHICH HAS BEEN APPLIED BY THE LOWER COURTS TO BAR RECOVERY OF EXPENSES SUSTAINED BY VESSELS TRAPPED AND DELAYED AS A RESULT OF THE CLOSING OF A PORT DUE TO A COLLISION CAUSED BY THE NEGLIGENCE OF ANOTHER VESSEL, EVEN WHERE SUCH INJURY IS CLEARLY FORESEEABLE AND DIRECTLY AND PROXIMATELY CAUSED BY SUCH NEGLIGENCE?

PARTIES BELOW

Canadian Transport Company*
Clipper Maritime Co. Ltd.*
Ultraocean, S.A.*
I.S. Joseph Company Inc.
Sabine Towing & Transportation Company
Hercules Carriers, Inc.**

*Petitioners in this Court.

**Respondent in this Court.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Canadian Transport Company, Clipper Maritime Co., Ltd., and Ultraocean, S.A. ("Petitioners"), petition for a Writ of Certiorari to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit rendered on denial of rehearing May 17, 1984.

OPINIONS OF LOWER COURTS

The en banc decision of the United States Court of Appeals for the Eleventh Circuit, affirming the decision of the United States District Court for the Middle District of Florida, Tampa Division, by an equally divided court, is in Appendix A to this Petition, (A. 1), and is reported at 728 F.2d 1359. Under Eleventh Circuit Local Rule 26(k), the effect of granting en banc rehearing was to vacate the original panel opinion which appears at Appendix B (A. 2), and is reported at 720 F.2d 1201. The United States District Court for the Middle District of Florida, Tampa Division, dismissed Petitioners' claims on a motion to dismiss. Appendix D, (A. 12). The District Court

adopted by reference its Memorandum Opinion and Order in a factually similar but unrelated case which order appears in Appendix E. (A. 14).

JURISDICTION

The Judgment rendered by the United States Court of Appeals for the Eleventh Circuit, en banc, was entered March 30, 1984. Appendix F, (A. 18). A timely petition for rehearing of the en banc decision was denied on May 17, 1984. Appendix G, (A. 20). This Petition for Certiorari was filed within 90 days of the denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. *District Court Jurisdiction.*

Jurisdiction of the United States District Court, Middle District of Florida, was predicated upon Article III, §2, United States Constitution, 28 U.S.C. §1333 and 46 U.S.C. §181, *et seq.*

B. *Facts and Procedural History.*

Tampa Bay is a natural harbor which is serviced by one main shipping channel thirty-four feet in depth and approximately four hundred feet wide. On the morning of May 9, 1980, Respondent's vessel, M/V SUMMIT VENTURE, collided with the Sunshine Skyway Bridge spanning Tampa Bay, causing a majority of the main span to collapse into the channel. The channel was closed to all navigation by deep draft commercial vessels seeking ingress and egress to the port of Tampa for many days.

Respondent, Hercules Carriers, Inc., filed a complaint for exoneration from or limitation of liability resulting from the collision. Numerous potential claimants, including Petitioners, answered and filed claims in the proceeding.

Petitioners, as vessel operators and charterers, sought damages directly and foreseeably caused by Respondent's negligence. These damages consisted of out-of-pocket disbursement for charter hire, bunkers, port expenses, tug boats and other similar expenses incurred during the period of time their ships were delayed and precluded from using the only channel servicing the port of Tampa because of the blockage.

In the District Court, Respondent moved to dismiss the Petitioners' claims for failure to state a claim upon which relief could be granted. The motion was granted by the United States District Court for the Middle District of Florida, Tampa Divi-

sion, which relied upon its prior order in an unrelated case which was subsequently affirmed in *Kingston Shipping Co. v. Roberts*, 667 F.2d 34 (11th Cir. 1982), cert. denied, 458 U.S. 1108, 102 S.Ct. 3487, 73 L.Ed.2d 1369 (1982). Appendix D and E, (A. 12, 14).

Petitioners' claims were dismissed out-of-hand by the District Court, prior to discovery as to the nature and extent of the claims. The District Court relied upon *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 72 L.Ed. 290, 48 S.Ct. 134 (1927), and held that Respondent was not liable for negligent acts causing economic loss to Petitioners.

The District Court was originally affirmed by a three judge panel of the Court of Appeals. 720 F.2d 1201; Appendix B, (A. 2). Judge Clark, in an extensive concurring opinion, suggested that the case should be reheard en banc because of a misapplication of *Robbins, supra*, here and in the Eleventh Circuit's previous decision in *Kingston Shipping Co., supra*. A timely petition for rehearing en banc was granted, and an equally divided Court of Appeals affirmed the District Court's judgment, by operation of law, with no opinions being written. 728 F.2d 1359; Appendix A, (A. 1). A petition for rehearing of the en banc decision was timely filed and was denied on May 17, 1984. Appendix G, (A. 20).

Although the cases were not formally consolidated, the present case was jointly orally argued, before both the original panel and the Court of Appeals en banc, with *United States of America v. I.S. Joseph Shipping, Ltd.*, 720 F.2d 1206 (11 Cir. 1983). *I.S. Joseph Shipping, Ltd.*, arose out of the same collision which was the subject of *Kingston Shipping Co. v. Roberts, supra*.[1]

1/ Petitioners believe that some of the delay claimants in *I. S. Joseph Shipping, Ltd.* will be filing a Petition for Writ of Certiorari in this Court.

REASONS FOR GRANTING THE WRIT

WHERE A VESSEL NEGLIGENTLY BLOCKS A CHANNEL CAUSING OTHER VESSELS TO INCUR EXPENSES, THE NEGLIGENT VESSEL SHOULD BE HELD ACCOUNTABLE FOR ALL FORESEEABLE DAMAGES PROXIMATELY CAUSED BY ITS NEGLIGENCE. TO THE EXTENT THAT *ROBINS DRY DOCK & REPAIR CO. V. FLINT*, 275 U.S. 303, 48 S.CT. 134, 72 L.ED. 290 (1927), PRECLUDES SUCH RECOVERY IT SHOULD BE OVERRULED.

The effect of the Eleventh Circuit's en banc rehearing was to affirm, by an equally divided Court, the District Court's reliance upon *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927), for the proposition that there is no recovery for economic loss without physical impact. This is not the Robins rule, but an unwarranted extension of *Robins* by the lower courts, as urged by Judge Clark in his original panel opinion in this case. (A. 3). With a few pertinent exceptions which have applied general tort proximate cause-foreseeability tests[2], the lower courts have interpreted *Robins* as an absolute bar to recovery of damages unassociated with physical impact, regardless of the fact that such damages were directly and proximately caused by the defendant and were clearly foreseeable at the time of the negligent act.

Where applied as a bar to claims, interpretations of *Robins*, even within the same Circuit, have not been consistent. The Second Circuit abandoned a "negligent interference with contract" rationale in favor of a negligence-causation-foreseeability analysis with respect to claims for economic loss by *owners* of vessels or facilities sustaining economic loss in *Petitions of Kinsman Transit Authority*, 388 F.2d 821 (2nd Cir. 1968). However, it affirmed the Southern District of New York's reluc-

2/ *See, e.g., In re Lyra Shipping Company, Ltd.*, 360 F.Supp. 1188 (E.D.La. 1973); *In re China Union Lines Ltd.*, 285 F.Supp. 426 (S.D. Tex. 1967); *Petitions of Kinsman Transit Authority*, 388 F.2d 821 (2nd Cir. 1968); *National Steel Corporation v. Great Lakes Towing Company*, 574 F.2d 339 (6th Cir. 1978); *Chicago & W.I.R.R. v. BUKO MARU*, 1974 A.M.C. 2287 (N.D. Ill.), aff'd, 505 F.2d 579 (7th Cir. 1974).

tant application of the "negligent interference with contract" interpretation of *Robins* to absolutely bar the claim of a time charterer for expenses and loss of use resulting from a collision with another vessel. *Federal Commerce & Navigation Co., Ltd. v. M/V MARATHONIAN*, 392 F.Supp. 908, 913 (S.D.N.Y. 1975), aff'd 528 F.2d 907 (2nd Cir. 1975), cert. denied, 425 U.S. 975, 96 S.Ct. 2176, 48 L.Ed.2d 799 (1976).

The Fourth Circuit, in *Marine Navigation Sulphur Carriers Inc. v. Lone Star Industries Inc.*, 638 F.2d 700 (4th Cir. 1981), appears to apply the no recovery absent physical damage rationale. However, a previous decision, *Venore Transportation Company v. M/V STRUMA*, 583 F.2d 708 (4th Cir. 1978), allowed a time charterer to recover charter hire paid to the vessel owner during repair delay, as part of the foreseeable damages directly resulting from a collision. The Court held that *Robins* barred only a claim for loss of profits, and that the time charterer in *Robins* had not paid charter hire for the period during which the vessel was out of service.

While Petitioners submit that, limited to its facts, *Robins* does not represent an absolute bar to recovery of economic damages absent impact by either owners or time charterers, if it does, it is time for this Court to reassess that bar in light of more than fifty years of development of the doctrines of proximate cause and negligence-causation-foreseeability.

A. The Decision In *Robins*

In *Robins*, a time charterer brought suit against a dry dock company to recover loss of use of the chartered vessel on the theory that the contract for dry dock was made for its benefit. The dry dock had negligently damaged the vessel's propeller causing her to be detained for several days while she was laid up for normal repairs. The time charterer filed suit to recover the market value of its loss of the use of the vessel. Charter hire was suspended during repair. The dry dock had previously settled a suit with the vessel's owners. In his opinion, Justice Holmes

stated the issue as follows:

> The question is whether the respondents [charterers] have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter. If they have, it must be worked out through their contract relations with the owners, not on the postulate that they have a right *in rem* against the ship.
>
> [275 U.S. at 308]

In denying recovery to the charterer, the Court opined that the injury to the propeller did no wrong to the time charterer but only to the vessel's owner. The Court then stated the following, often misapplied, language:

> . . . a tort to the personal property of one man does not make the tort-feasor liable to another *merely* because the injured person was under a contract with that other, *unknown to the doer of the wrong*. (Emphasis added).
>
> [275 U.S. at 309]

Robins has been impermissibly extended to tort damage situations where direct injury to charterers has been clearly foreseeable, and has been improperly interpreted to bar recovery of all economic losses not associated with actual physical damages to some property of the injured owner, regardless of the fact that such damage was clearly foreseeable and the losses were directly and proximately caused by another's negligence.

B. *Robins* Does Not Bar Recovery Of Economic Loss Not Associated With Physical Damage

As the concurring opinion of Judge Clark in the original panel decision demonstrates (A. 5), nothing in *Robins* will support the broad proposition that economic losses not associated with physical impact or damage are not recoverable under any circumstances. Nevertheless, this is the interpretation given *Robins* by the Eleventh and Fifth Circuits. *E.g., Kingston*

Shipping Co., supra; Akron Corp. v. M/T CATIGNY, 706 F.2d 151, 153 (5th Cir. 1983). Judge Clark's concurring opinion correctly analyzes both *Robins*, and *Byrd v. English*, 117 Ga. 191, 43 S.E. 419 (1902), upon which *Robins* relied.

In a *State of Louisiana ex rel. Guste v. M/V TESTBANK*, _____ F.2d _____ (5th Cir. 1984), Case No. 82-3059 (April 2, 1984), Judge Wisdom called for reconsideration of the Fifth Circuit's engrafting of a physical damage requirement upon *Robins:*

> The Fifth Circuit has extended *Robins* unnecessarily by establishing an absolute requirement of physical property damage. This extension is certainly not required by *Robins*, and the physical-damage requirement is itself artificial. (A. 26).

Guste is presently pending on rehearing in the Fifth Circuit and is scheduled for oral argument the week of September 10, 1984. The original panel opinion is contained in Appendix H. (A. 22).

Neither in its strict language, nor through necessary implication from its facts, does *Robins* embody or justify the rule engrafted upon it by the Fifth and Eleventh Circuits, and applied by the District Court in this case, to bar the claims at issue. Liability without impact was not an issue in *Robins*. On its facts, *Robins* actually represents an application of the tort doctrine of reasonably foreseeable consequences in a case erroneously brought as a contract action. *Robins* should not stand as an artificial barrier to recovery of economic loss reasonably to be foreseen by tort feasors in other fact settings. *Robins* should not be extended beyond its facts to bar recovery where the injury is not remote or speculative, but is directly and proximately caused by the tort feasor's negligence and is capable of reasonable determination under existing legal principles relating to negligently inflicted damages.

Even in the Fifth Circuit, the reliance upon *Robins* as a pro-

hibition to recovery for economic losses not associated with physical damages has not been uniform. In *J. Ray McDermott & Co. v. S/S ERGO*, 453 F.2d 1202 (5th Cir. 1972), the Court allowed the constructor of a pipeline to recover delay damages in completion of the work caused by the dropping of an anchor in the face of a challenge by the defendant that *Robins* prohibited such relief, and the alternative claim that the damages were too remote and unforeseeable. The Court noted that the damages sought were actual "expenses incurred" because of delay, and not "what might have been earned", i.e., speculative profits. 453 F.2d at 1203. The contractor did not own the pipeline and evidently the pipeline itself was not impacted by the ship's anchor. The delay was encountered by the fact that it took some ten hours to determine what, if anything, happened because of the dropping of the anchor, and whether it could be raised without damaging the pipe. The Fifth Circuit held that the contractor had a sufficient proprietary interest in the pipeline under *Robins*, and stated:

> *Robins* does not stand for the proposition that no-one may recover damage suffered or liability incurred by virtue of a contract when a ship is tortiously detained. Certainly the ship owner may recover all damages proximately caused by another's tortious conduct with respect to his ship.
>
> [453 F.2d at 1204]

Once the presumed *Robins* ban on "economic losses" not associated with physical damage is recognized as an unwarranted extension of the narrow principle expressed in that decision, this Court must reexamine *Robins* and the issue of "economic loss" in light of the general tort principles of proximate cause and the negligence-causation-foreseeability of injury analysis which prevails in all other common law negligence actions.

C. General Tort Concepts Should Govern The Recovery Of Economic Loss In Maritime Cases

The principal concern of courts which have accreted the concept of no liability for economic loss not associated with physical impact to *Robins* is the general problem of remote and speculative damages. This concern presents no greater problem than is ordinarily presented to courts in cases where the possibility of unforeseeable or tenuous consequences may be involved. The District Courts are certainly not unfamiliar with these problems. *E.g., Petitions of Kinsman Transit Authority, supra; In re Lyra Shipping Company, Ltd., supra;* Restatement of Torts, (2d) §435(2).

In *Kinsman Transit,* the Court refused to extend the rationale of *Robins,* and held that the claimants were not entitled to recover because essential tort elements had not been proved, and because the connection between the negligence and the claimants' eventual damage was too remote and tenuous to permit recovery. 388 F.2d at 825. In dispensing with any application of *Robins,* the *Kinsman Transit* Court had no difficulty in analyzing the claims in light of traditional tort principles and the concept of foreseeability, and in rejecting the damages of Cargill & Cargo Carriers in that case because the causual link between initial negligence and ultimate injury was clearly remote and legally unforeseeable.[3]

The concepts of the foreseeable plaintiff, legally foreseeable consequences and proximate cause present no novel or particularly difficult problem to the District Courts. A comparison of *Kinsman Transit* with *Lyra Shipping, supra* provides a primary example of the workable application of the proximate cause/foreseeability analysis whereby the exact *type* of damage is, and should be, allowed in one set of facts but not another.

3/ For the full factual situation, which involved an unforseeable end result to an improbable chain of events, see "*Kinsman* I", *Petitions of Kinsman Transit Company,* 338 F.2d 708 (2d Cir. 1964), cert. denied, 380 U.S. 944, 85 S.Ct. 1026, 13 L.Ed. 2d 963 (1965).

The application of the established tort concept of negligence-causation-foreseeability should also preclude any absolute ban on time charterers recovering economic loss directly and foreseeably caused by another vessel's negligence. The Petitioners here were all time charterers. After dismissal of the claims by the District Court, it has come to light that SUMMIT VENTURE was, at the time of the casualty, operating under a time charter. Moreover, the time charterer had sub-chartered her to another and she came to Tampa to load a cargo of phosphate pursuant to the sub-charter. *In re Hercules Carriers, Inc.*, 566 F. Supp. 962 (M.D. Fla. 1983).

When one considers that the vast majority of vessels are subject to being chartered during their economic life, from the SUMMIT VENTURE'S vantage point in this case the concept of the unforeseeable plaintiff applied to a time charterer is specious. Whatever may have been the wisdom of Justice Holmes applying an actual knowledge standard to the dry dock owner in *Robins* with respect to the time charter under the facts there presented, the SUMMIT VENTURE stands in a decidedly different position in the present case. *See, Chicago & W.I.R.R. v. BUKO MARU, supra.* In the context of the reasonably foreseeable consequences of its negligence, whether damage is sustained by an owner or time charterer or other charterer is an irrelevant fortuity. It is enough that the foreseeable damage which occurred happened to one who was a reasonably foreseeable victim to one in Respondent's position.

Here, Petitioners' damages arose directly out of the most common of maritime torts—a collision. From the vantage point of the Respondent, *Robins* should not bar Petitioners' recovery in this case, either as to foreseeability or remoteness of damages.

In *The SUCARSECO*, 294 U.S. 394 55 S.Ct. 467, 79 L.Ed. 942 (1935), this Court, applying standard tort principles in a collision case, refused to extend *Robins* and permitted owners of cargo to recover their general average contribution in a case where both vessels were at fault. The cargo was carried under a

bill of lading containing a "Jason clause", which required cargo to contribute with the ship owner in general average for losses or expenses arising out of the collision. 294 U.S. at 399-400. The owner of the TOULMA, the carrying vessel, relying on *Robins*, argued that liability of cargo to contribute in general average arose solely from "contract", and the claim of the cargo owners for the refund of their general average contribution was derivative and not directly recoverable from the non-carrying vessel, the SUCARSECO. In holding that, in a division of the entire damages between the two vessels, the non-carrying vessel may recoup from the carrying vessel one half of the amount it paid to the cargo owners, the Court correctly noted that the direct liability of the non-carrying vessel for cargo damages was ". . . 'one of the consequences plainly to be foreseen,' . . .". 294 U.S. at 401.

In allowing recovery against the contention of remoteness of the damage, the Court clearly limited *Robins* to its facts:

> But the right to that inclusion springs directly from the tort and in that relation no question is raised as to proximate cause or foreseeable consequences.
>
> The nature of these expenditures and the fact that they are traceable directly to the collision are not changed by the sharing in general average. That merely affects the distribution of the loss, not its cause.
>
> * * *
>
> The right does not stand on subrogation any more than the right of Sucarseco to bring into the division of damages the amount it has to pay to the cargo owners rests on subrogation. . . . In each case the right arises directly from the tort.
>
> The contention as to remoteness is but another way of presenting the same question. This is not a case of an attempt, by reason of 'a tort to the person or property of one man,' to make the tort feasor liable to another 'merely because the injured person was under a contract with the other unknown to the doer of the wrong.' . . . Here, cargo as well as ship was placed in jeopardy. That jeopardy was

> due in part to the negligence of the vessel against which the claim is made. (Citations omitted)
>
> [294 U.S. at 404].

The type of damages sought by Petitioners in this case are no different than those typically recovered by owners of physically damaged vessels or facilities. The *AURORA*, 64 F. Supp. 502 (E.D.La. 1945), aff'd, 153 F.2d 224 (5th Cir. 1946); *Venore Transportation Company v. M/V STRUMA, supra; Vicksburg Towing Co. v. Mississippi Marine Transport*, 609 F.2d 176 (5th Cir. 1980). To award the same type of damage to time charterers, as given to owners under identical circumstances, raises no possibility of unending damage or unlimited liability. *See Lyra Shipping, supra.* In fact, the existence of a charter party may help define and limit a negligent party's liability to an extent which would not have otherwise existed, always subject to the rule of reasonableness.

Unlike the time charterer in *Robins*, the Petitioners here did not fail to receive their vessel because of the defendant's negligence. They do not seek speculative profits from the results of voyages not undertaken or for which they had not contracted. *See Dick Meyers Towing Service, Inc. v. United States*, 577 F.2d 1023 (5th Cir. 1978), cert. denied, 440 U.S. 908, 99 S.Ct. 1215, 9 L.Ed.2d 455 (1979). They were not deprived of their contractual benefits with the vessel's owners. The ships were perfectly capable of being used but had no place to go and incurred added expenses because of the blocked channel. There is no rational "pragmatic objection" under prevailing judicial tort policy to deny damages to a charterer, and the problems which exist from a procedural standpoint are readily solvable under existing procedures:

> If there were no charter the owner who lost the vessel's use could recover for that loss measured by its reasonable value. If the defendant were liable to the charterer instead, it would not be a wide and open-ended liability, but a finite one that the tortfeasor or his liability insurer would expect

> to pay under frequently occurring circumstances. There seems to be no valid reason why defendant should escape this ordinary item of damages just because the loss in this case happened to be suffered by one who had no proprietary interest in the ship. What has been called the pragmatic objection simply has no application. There are some practical — or 'pragmatic' — difficulties but they are of a different nature and a lower order of magnitude. There are questions of proper parties, of the proper measure of damages, of the protection of defendant against multiple vexation and double liability, and of protection of the settlement process. All these difficulties, however, are readily solvable by familiar procedural devices. The presence of both the charterer and owner as parties plaintiff in the suit could be required, and this would answer proper parties and multiple vexation questions. The measure of damages, in any event, should be limited to reasonable value. Settlement in good faith with either party should be held to bar the other on the very appropriate analogy from the law of bailment.
>
> [James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 Vand. L.Rev. 43, 56-57 (1972)].

In *M/V STRUMA*, *supra*, the Fourth Circuit held that damages for loss of the use of the vessel is a traditional element of recovery and, in a situation where the owner of the damaged vessel can make no claim because its contract with the charterer requires the charterer to pay hire irrespective of the vessel's detention, the tort feasor should not be benefited, but should be made to pay for the loss. The Fourth Circuit's treatment of the "proprietary interest" and "profits vs. expenses" issues was identical to the Fifth Circuit's rationale as to the contractor in *S/S ERGO*, *supra*.

The misapplication of *Robins* by most lower courts to deny recovery in collision cases because of a lack of a proprietary interest produces an irrational distinction from the standpoint of modern concepts of proximate cause and foreseeable damage. The Court in *Vicksburg Towing Co. v. Mississippi Marine*

Transport Co., supra, eschewed any application of *Robins* to a situation where the plaintiff-owner-lessor sued for loss of rentals resulting from damage to its barge unloading facility. The contract provided that the lessee was to assume all responsibility for repairs to the premises during the term of the lease. Insurance proceeds might be applied to the repair cost, but the remainder would be paid by the lessee. The defendant settled with the lessee and the plaintiff/owner's claims were tried. The Court avoided any application of *Robins* only on the artificial distinction that the plaintiff was the "owner" of the facility. The Court, as a matter of judicial policy, correctly disposed of the defendant's claim that the contract provisions for abatement of rent should be applied as a contractual bar to recovery:

> The tort feasor here may not take advantage of a contractual agreement between the owner and tenant and thereby relieve itself of the obligation to make the owner whole for the damage negligently caused to the owner's property.
>
> [609 F.2d at 178]

There is simply no rational justification to allow recovery to an owner, but not to a charterer or lessor. Certainly, the tort feasor's conduct has not been governed by his actual knowledge of the existence of contracts affecting rights with respect to the allocation of damages he causes. His conduct is or should be governed by his realization that certain direct economic losses are sure to flow from his negligent conduct. The contract merely presents a question of proper allocation of damages.

The question in this case is not whether Respondent should be liable in an unlimited degree for every possible "ripple" conse-

quence of its negligence.[4] *Petitions of Kinsman Transit Co.* (II), *supra*. Petitioners do no advocate such as a rule even in this limitation action, any more than it is the rule in any other tort situation. Rather, the policy of the law must be directed, on a case by case basis, to the particular circumstances which the tort feasor faced in assuming the risk of his conduct. When so directed, the apparition of unlimited liability fades.

Here, Respondent has invoked the Limitation of Liability Act, 46 U.S.C. §181, *et seq.*, which itself is based upon public policy of fostering maritime commerce. *British Transport Commission v. United States*, 354 U.S. 129, 77 S.Ct. 1103, 1 L.Ed.2d 1234 (1957). All who sought recovery for direct economic losses timely filed claims in the limitation proceeding. Thus, by operation of law, any other potential claims are foreclosed and the spectre of multiple suits does not exist. Rule F(5), Supplemental Rules, F.R.Civ.P. The present case presents a finite number of claimants, all direct users of the navigational channel in Tampa Bay, and the spectre of an indeterminate class of claimants is not a consideration.

Similarly, the argument that claims for economic loss, as a matter of fact, present questions of speculative, remote and indeterminable damages has no bearing in this case; the claims here are for direct and readily calculable out-of-pocket expenses. Once the psychological impediment of "no physical impact" is hurdled, "economic loss" cases become nothing more than question of damages. Are they foreseeable or remote with respect to the chain of causation? In a given case is the recovery just or unjust? Everyday questions for the District Court in tort cases.

4/ It is conceivable that as a result of Respondent's negligence a tourist attraction in the Tampa Bay area failed to timely receive a shipment of curios and thereby lost business in its gift shop. A multitude of similar remote or speculative injuries could be conjured. It suffices to note that no claims for such losses have been filed in this limitation action, but, even if such claims were pending, that is no justification for refusal to consider valid claims for economic loss by other maritime interests *directly* and *proximately* caused by the channel closing. The law provides a suitable arsenal to the District Courts with which to dispatch remote or speculative complaints; the prophylactic remedy which *Robins* and its offspring represent is neither required nor just.

The only difference between the damages sought here and those traditionally awarded is that Petitioners' damages are not the result of a actual physical impact upon a proprietary interest. Certainly, in this day it is the policy of the law to protect parties from economic loss and to protect business expectancies. Certainly, the maritime court must protect the foreseeable commercial user of a navigable channel from direct losses caused by failure of a co-user to navigate with care, irrespective of whether that negligence results in physical damage to a chattel.

The ruling below, given the factual circumstances of this limitation action, effectively negates a central policy of maritime law - protection of maritime commerce. In addition to obtaining the benefits of limitation, the liability of a negligent party has for too long been further limited by an eroneous extension of an otherwise outmoded principle. Instead of protecting the rights of innocent parties damaged by Respondent's negligence, the unwarranted application and expansion of *Robins* operates unduly to protect the negligent. The direction in which the law should point was early and aptly stated by the Court in *Piscataqua Navigation Company v. New York, N.H. & H.R. Co.*, 89 F. 362 (D.Mass. 1898), aff'd in part and rev'd in part, 108 F. 92 (1st Cir. 1901)[5]:

> It is in accordance with a sound public policy to deny a private action when to grant it would give to every citizen a private action arising out of the same act. To hold, however, as a matter of law, that the consequences of litigating claims not for theoretical wrong nor de minimis, but for substantial private injury, may lead to such an intolerable multiplicity of suits that it is better that substantial private injuries should go unredressed would seem to be to found a new rule of public policy upon an apprehension hardly justified by the experience of the courts of jurisdictions where for many years no such rule has existed. If such a rule of public policy shall become necessary, it

5/ Comparison of the Circuit Court and District Court decisions will again demonstrate the ability of the Courts to distinguish, with relative ease and under principles of logic, the remote and speculative claim from those who are directly, foreseeably and irrevocably injured.

> certainly should be applied only when found necessary for the protection of the public and of the courts, and should not be given to a wrong doer to defend himself from the natural consequences of his wrong.
>
> [89 F. at 364-365]

See also, The AQUITANIA, 270 F. 239, 244 (S.D.N.Y. 1920). What compelling policy, public or legal, mandates that Respondent should obtain double protection in this limitation action? Or that substantial injuries sustained by Petitioners go unredressed?

Is it not likely that every significant maritime casualty will result in the owner of the negligent vessels seeking the benefit of the Limitation of Liability Act? Respondent did so in this case, as did the ship owners in the cases of *In re China Union Lines, supra, In re Lyra Shipping Company, supra,* and in virtually all other cases where the question of economic loss was decided without consideration of the fundamental maritime interest involved.

The policy of the law applied through normal concepts of foreseeability, and in the circumstances of this case, requires that respondent at least be held accountable for damages for out-of-pocket expenses and losses directly sustained by vessel users unable to enter or leave port, and whose economic livelihood, as does Respondent's, directly depends upon movement of vessels in and out of port. This approach would sufficiently define Respondent's liability and limit it in terms of the risk which Respondent assumed by the conduct of its own maritime commerce. Such policy would not impose liability beyond either the ambit of the risk which Respondent undertook, or the character of the maritime interest harmed by its negligence.

The concept of reasonable foreseeability, limited by reasonable *maritime* expectations together with the prospect of limitation of liability[6], is surely sufficient to protect negligent vessel owners from unlimited damages and yet afford recovery of damages which are directly related to, and arose out of, the risk of harm to Petitioners' maritime interest which Respondent's negligence created.

The concept of foreseeability may not logically be circumscribed by the fortuity of physical impact to, or proprietary interest in, the interest which Respondent's negligence harmed. The economic expectancy of both Respondent and Petitioners depends directly upon their respective rights to engage in commerce. Both must exercise their right with due care and neither should be allowed to escape the direct damages which their negligence afflicts upon another.

It is time that this Court re-examine *Robins* and its application or misapplication by the lower courts in the light of general tort principles, unencumbered by a doctrinaire application of "stare decisis" which does nothing but proliferate a broad and unwarranted application of a principle that has been undermined by the passage of time, is outmoded and is no longer legally or logically defensible.

6/ If an owner does not ultimately gain statutory limitation, because he knowingly allows a rogue vessel negligently to navigate shipping channels, no public policy rationale exists for otherwise limiting his liability for foreseeable and direct consequences of that negligence. Indeed, the public policy has always been to the contrary. In most instances the maritime tort feasor, even if not allowed to limit liability, still gains the protection of the admiralty court from multiple litigation.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CANADIAN TRANSPORT COMPANY,
CLIPPER MARITIME CO., LTD.,
and ULTRAOCEAN, S.A.,

Petitioners,

vs.

HERCULES CARRIERS, INC.,
as owner of the M/V Summit Venture,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX A

In the Matter of the Complaint of HERCULES CARRIERS, INC., for exoneration from or limitation of liability as Owner of the M/V SUMMIT VENTURE, Plaintiffs-Appellees,

v.

STATE OF FLORIDA, et al., Claimants,

Canadian Transport Company, Clipper Maritime Co., Ltd., I.S. Joseph Company, Inc., Ultraocean S.A., Sabine Towing & Transportation Company, Claimants-Appellants.

In the Matter of the Complaint of the UNITED STATES of America, as Owner of the USCGC BLACKTHORN, for exoneration from or limitation of liability, Plaintiff-Appellee,

v.

I.S. JOSEPH SHIPPING, LTD., I.S. Joseph Company, Inc., Clipper Maritime Co., Ltd., Pell Nederland, B.V. Termar Navigation Company, Turbana Banana Corp., Gulfcoast Transit Co., ABC Containerline, N.V., Wallenius Rederierna and Motorships, Inc., A/B Helsingfors Steamship Co., Ltd., and Alianza Naviera Argentina, D.A., Marthanassa Compania Naviera, S.A., Navios Corp. and Oceanside Ltd., et al., Claimants-Appellants.

Nos. 81-6005, 81-6078.

United States Court of Appeals,
Eleventh Circuit.

March 30, 1984.

Appeals from the United States District Court for the Middle District of Florida, George C. Carr, Judge.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

Because the court is equally divided as to whether to affirm or reverse, the judgment of the district court is AFFIRMED by operation of law.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-6005

In the Matter of the Complaint of
HERCULES CARRIERS, INC., for
exoneration from or limitation
of liability as Owner of the
M/V SUMMIT VENTURE,

Plaintiffs-Appellees,

versus

STATE OF FLORIDA, et al.,

Claimants,

CANADIAN TRANSPORT COMPANY,
CLIPPER MARITIME CO., LTD.,
I.S. JOSEPH COMPANY, INC.,
ULTRAOCEAN S.A., SABINE TOWING
& TRANSPORTATION COMPANY,

Claimants-Appellants.

APPEALS FROM THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA

(November 16, 1983)

Before GODBOLD, Chief Judge, HENDERSON and CLARK, Circuit Judges.

PER CURIAM:

On May 9, 1980, the M/V Summit Venture, owned by Hercules Carriers, Inc., a foreign corporation, struck the Sunshine Skyway Bridge which spans the entrance of Tampa Bay. As a result of the collision, damaged and sunken portions of the

bridge blocked other vessels' passage to and from the port of Tampa for several days.

Hercules Carriers, as the Summit Venture's owner, filed in district court a Complaint for Exoneration from and Limitation of Liability. The owners of delayed vessels responded with claims for damages for the costs incurred in maintaining those vessels and their crews. These costs included provisions, wharfage charges, additional towing charges, fuel, seamen's wages and loss of the vessels' use.

The district court had already dismissed similar claims made by other parties against another ship, the Capricorn. A few months before the Summit Venture struck the Skyway, the Capricorn had been involved in another collision, the wreckage of which had also blocked passage to and from the port of Tampa. The district court, for reasons stated in its earlier order of dismissal in the Capricorn's case, dismissed as well the present claims against Hercules.

A panel of this circuit has affirmed the district court's earlier order dismissing claims against the Capricorn. *Kingston Shipping Co. v. Roberts*, 667 F.2d 34 (11th Cir. 1982). That affirming decision controls the present case.

AFFIRMED.

CLARK, Circuit Judge, concurring specially:

I. Recovery for Pecuniary Loss for Unintentional Interference with Contract

The judgment of the district court must be affirmed in light of *Kingston*, but respectfully, I think that the panel in *Kingston* erred in its holding and in its reliance on *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927). The issue in this case is whether a shipowner, whose vessel negligently obstructs passage of the channel from the port of Tampa to the Gulf of Mexico, is liable in damages for actual costs incurred by vessels which are required to remain in the port pending removal of the obstructing vessel.

The *Robins* rule is not applicable because the facts here and in *Kingston* are significantly different from the facts in *Robins*.

In *Robins*, the time charterer of the S/S Bjornefjord sought damages from the dry dock company for loss of use of the chartered vessel. While the Bjornefjord was in the dry dock for normal repairs, the dry dock company negligently damaged the vessel's propeller causing her to be detained several additional days. The dry dock company settled with the Bjornefjord's owner. As to the time charterer, the Supreme Court held, "[A] tort to the person or property of one man [the ship's owner] does not make the tortfeasor liable to another [the time charterer] merely because the injured person was under a contract with that other, unknown to the doer of the wrong." 275 U.S. at 309, 48 S.Ct. at _____, 72 L.Ed. at _____. The Court elucidated its grounds for denying recovery to the time charterer as follows:

> The question is whether the respondents [the time charterers] have an interest protected by the law against unintended injuries inflicted upon the vessel by third persons who know nothing of the charter. If they [the charterers] have, it must be worked out through their contract relations with the owners, not on the postulate that they have a right in rem against the ship.

275 U.S. at 308, 48 S.Ct. at 135, 72 L.Ed. at _____.

The classic case favored by the text writers to illustrate the rationale for barring an action by the contracting party not in privity with the tortfeasor is an early Georgia case. In *Byrd v. English*, 117 Ga. 191, 43 S.E. 419 (1902), defendants, while excavating for a building, cut a line owned by Georgia Electric Light Company which powered plaintiff's printing factory. Plaintiff sued the excavator for damages due to the interruption of his printing business. Judge Candler wrote:

> What was [plaintiff's] right to that power supply? Solely the right given him by virtue of his contract with Georgia Electric Light Company, and with that contract defendants are not even remotely connected. If, under the terms of his contract, he is precluded from recovering from the electric light company, that is a matter between themselves for which the defendants certainly can not be held responsible. *They are, of course, liable to the [electric] company for any wrong that may have been done it, and the damages recoverable on that account might well be held to include any sums which the company was compelled to pay in damages*

> *to its customers; but the customers themselves can not go against the defendants to recover on their own account for the injury done the company.*

117 Ga. at 194, 43 S.E. at _____ (Emphasis added).

In *Robins* and *Byrd*, plaintiff A was in contract with party B, who failed to deliver contracted for benefits to A because of interference from tortfeasor C. Since A's injury resulted from B's failure to perform his contractual obligations, A's remedy, if any, is against B on the contract, and not against C, who cannot be touched for want of privity. The instant case, however, is solely a matter of tort. There is only plaintiff A who has suffered economic loss at the hands of tortfeasor C. There is no party B, no contract upon which A might base a claim for recovery, and no privity bar to an action against C.[1]

In short, the relationship between the parties in *Robins* is fundamentally different here; regrettably, *Robins* has been extended to situations such as the case here and been interpreted to mean that economic losses not associated with physical damage are not collectible. It is this misapplication of *Robins* that led the *Kingston* panel astray in expounding its rationale for denying recovery. In deference, I should point out that the *Kingston* panel did not wholeheartedly endorse the wisdom of the derived rule, which I believe the circuit must examine en banc.[2]

---

[1]This distinction finds support in the case of *Federal Commerce & Navigation Co. v. Marathonian*, 528 F.2d 907 (2d Cir. 1975), where the court noted that "[t]he *Robins* rule appears to be based on a contract theory, denying relief to one injured by negligent interference with contract" and that but for the presence of a contract between the vessel ROLWI and the plaintiff time charterer, who lost profits due to delays incurred after the tortfeasor negligently damaged the ROLWI, "we might question whether at least the damage is not so reasonably to be expected as to justify recovery." *Id.* at 908 (citing *Kinsman*); *see also Pruitt v. Allied Chemical Corp.*, 523 F.Supp. 975, 981 (E.D. Va. 1981) ("*Robins* is . . . arguably less than dispositive here, because it essentially involved questions of the law of third party contracts not necessarily applicable in the instant case.").

[2]The panel quoted *Louisville and Nashville Railroad Co. v. M/V Bayou Lacombe*, 597 F.2d 469 (5th Cir. 1980), in which Judge Wisdom wrote:

> *Whatever the wisdom of the traditional rule of nonliability for negligent acts causing economic loss, Robins* reflects the state of the law in this circuit.

667 F.2d at 35 (emphasis added)

II. Recovery for Pecuniary Loss Not Associated with Physical Damage

The negligent obstruction of a navigable channel violates a duty owed to other users of the channel, and is a violation of federal statute.[3] If one negligently obstructs a channel with a sunken ship or other submerged debris, the owner of a vessel striking such an obstruction can recover damages for repair to his vessel, as well as for loss of use; there can be no doubt that in such a case the defendant's negligence is the direct, proximate and foreseeable cause of the shipowner's physical and economic damages.[4] In the same way, one can anticipate that negligent obstruction of the only outlet from a port will cause economic damage to those shipowners whose vessels are trapped in the port and delayed thereby.

Here, appellee's vessel negligently collided with a bridge, resulting in collapse of the bridge and obstruction of the outlet to the port of Tampa. The only two theories that could be advanced to deny recovery for the economic losses sustained by the owners of ships trapped in the bay are (1) the loss is too remote — the practical need for curtailing potentially limitless liability requires that a line be drawn somewhere, and here that line must be drawn to preclude the shipowners from recovering purely economic losses arising from a collision in which they are not directly involved; and (2) economic loss, unaccompanied by physical damage is unrecoverable as a matter of law.

With regard to the first theory, a court can deny recovery for damages if the loss is catastrophic and the tortfeasor could not foresee the consequences. Res. of Torts 2d § 435(2). Recovery will likewise be denied when the damages are too tenuously or remotely related to defendant's negligence. *Petition of Kinsman Transit Authority*, 388 F.2d 821 (2d Cir. 1968). The potential for limitless liability need not be a problem in this case, if claims are limited to vessels trapped inside the bay. It is true that a vessel in New Orleans about to embark for Tampa might be delayed in departing because of the obstruction. However, that vessel can alter its plans to effect a reduction or elimination of its loss; consequently, its losses may be deemed too remote to

[3] 33 U.S.C. §§ 403, 409; *Humble Oil Refining Co. v. Tug Crochet*, 422 F.2d 602, 608 (5th Cir. 1970).

[4] *Ingram Corp. v. Ohio River Co.*, 505 F.2d 1364 (6th Cir. 1974); *Gaspar v. United States*, 460 F.Supp. 656 (D.Mass. 1978); *Oil Transport Co. v. The Lunga Point*, 182 F.Supp. 1357 (D.C. La. 1960).

permit recovery. The vessel caught within the port of Tampa, however, has no means of avoiding the consequences of the negligence of the obstructing vessel. To the extent its losses may be calculated with reasonable certainty, no reason exists to deny recovery.

As to the second theory, several cases indicate that recovery is permissible notwithstanding the lack of physical damage to plaintiff's property.[5] In *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), the Ninth Circuit held that a clearly finite group of plaintiffs could recover their heavy financial losses, although they suffered no physical damage. Plaintiffs, commercial fishermen, lost profits due to defendant's oil spill in the Santa Barbara Channel. The court allowed recovery for the purely economic loss resulting from the fish kill, but allowed recovery only to commercial fishermen, although the spill affected other broad categories of activity. The court specifically noted the loss of the use of private pleasure craft, but stated that the plaintiffs asserted "injury to their commercial enterprises, not to their 'occasional Sunday piscatorial pleasure.'" 501 F.2d at 570.

Limits more relevant to the circumstances of the present case have been suggested. In *In re Lyra Shipping Company, Ltd.*, 360 F.Supp. 118 (E.D. La. 1975), plaintiffs, having sus-

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[5]*Union Oil* and *Lyra Shipping* are discussed below. *See also National Steel Corp. v. Great Lakes Towing Co.*, 574 F.2d 339, 343 (6th Cir. 1978) ("The boat struck the railroad bridge due to defendant's negligence, causing structural damage. Since transportation across the bridge was a necessary link in National Steel's production process, plaintiff lost production time during the three days required to repair the bridge. While we agree that at some point the link between cause and effect may be 'too tenuous' — that what is claimed to be consequence is only fortuity, that point is not reached in this case."); *Pruitt v. Allied Chemical Corp.*, 523 F.Supp. 975 (E.D. Va. 1981) (A chemical company that negligently polluted a bay, killing the fish was held liable for economic losses suffered by commercial fishermen and local boat, tackle and bait shop owners, but not plaintiffs purchasing and marketing seafood from commercial fishermen, whose losses, while foreseeable, were insufficiently direct.); *In re China Union Lines, Ltd.*, 285 F.Supp. 426 (S.D. Tex. 1967) ("Certainly, the UNION RELIANCE [the negligent vessel] owed a duty to all those using or seeking to use the ship channel not to obstruct their passage. Further, it was clearly foreseeable that a negligent collision in the narrow channel would effectively delay all traffic for at least some substantial period of time. When the negligence of the UNION RELIANCE caused the collision, the duty was breached and the foreseeable was made fact. Consequently, such damages as these claimants may prove were incurred because denied normal access to the channel are, in my opinion recoverable."). *Id.* at 427.

tained no physical damages, sought recovery of financial losses arising from the collision of the Galaxy Faith with the Industrial Canal Locks. Judge Cassibry, in a thoughtful opinion, stated in a footnote:

> Defendant, *in terrorem*, suggests that to permit recovery of such costs to all carriers for the entire period the Industrial Canal Locks were closed to marine traffic would impose a crushing burden upon it. Plaintiffs suggest in response that no party should be able to recover such costs whose vessels were not already irrevocably committed to passage through the Locks at the time the accident occurred. The basis of this limitation is that once the nonavailability of the Canal became a foreseeable contingency, all shippers and carriers would be free in the future to protect their interests as best they could. Carriers could intelligently estimate their increased costs when offering their services; and shippers likewise could decide whether alternative modes of transportation should be employed in their businesses during the temporary emergency. It is argued, however, that those parties caught unawares were particularly vulnerable to the harm caused by the defendant's conduct and should be afforded special protection.

360 F.Supp. at 1191-92. Judge Cassibry did not decide this question because all the claims allowed by the court grew out of damages suffered by carriers actually traversing the canal at the time the Galaxy Faith struck the Industrial Canal Locks. Nonetheless, the distinction he made would be suitable for distinguishing between many of the claims in the present case where there were ships caught in port as well as ships kept out.

Liability for damages growing out of torts must be decided on a case-by-case basis depending on the peculiar facts.[6] But for *Kingston*, I would remand this case to the district court to determine whether any ships proximately delayed by the negligent obstruction can establish unavoidable losses caused thereby. The court would be guided by established tort principles and not be misguided by the misplaced reliance upon *Robins*. As it is, *Kingston* must control here, but should be reconsidered by this circuit en banc.

[6]This comports with Judge Kaufman's analysis in *Kinsman*, where plaintiff was denied recovery for economic losses, not as a matter of law, but rather "under all the circumstances of this case." *Petition for Kinsman Transit Authority*, 388 F.2d 821, 825 (2d Cir. 1968).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 81-6005

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
DEC 13 1983
Spencer D. Mercer
Clerk

IN THE MATTER OF THE COMPLAINT OF HERCULES CARRIERS, INC., for exoneration from or limitation of liability as Owner of the M/V SUMMIT VENTURE,

Plaintiffs-Appellees,

versus

STATE OF FLORIDA, ET AL.,

Claimants,

CANADIAN TRANSPORT COMPANY, CLIPPER MARITIME CO., LTD., I.S. JOSEPH COMPANY, INC., ULTRAOCEAN S.A., SABINE TOWING & TRANSPORTATION COMPANY,

Claimants-Appellants.

No. 81-6078

IN THE MATTER OF THE

COMPLAINT OF THE UNITED STATES OF AMERICA, as Owner of the USCGC BLACKTHORN, for exoneration from or limitation of liability,

Plaintiff-Appellee,

versus

I.S. JOSEPH SHIPPING, LTD., I.S. JOSEPH COMPANY, INC., CLIPPER MARITIME CO., LTD., PELL NEDERLAND, B.V. TERMAR NAVIGATION COMPANY, TURBANA BANANA CORP., GULFCOAST TRANSIT CO., ABC CONTAINERLINE, N.V., WALLENIUS REDERIERNA AND MOTORSHIPS, INC., A/B HELSNGFORS STEAMSHIP CO., LTD., and ALIANZA NAVIERA ARGENTINA, D.A., MARTHANASSA COMPANIA NAVIERA, S.A., NAVIOS CORP. and OCEANSIDE LTD., ET AL.,

Claimants-Appellants.

Appeals from the United State District Court
for the Middle District of Florida

ON PETITIONS FOR REHEARING AND
PETITIONS FOR REHEARING EN BANC
(Opinion November 16, 1983,
11 Cir., 198__, __F.2d__)

(December 13, 1983)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

BY THE COURT:

A member of this Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the case shall be reheard by this court en banc *with* oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of en banc briefs.

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In the Matter of the Complaint of
HERCULES CARRIERS, INC. for
exoneration from or limitation of
liability as owner of the M/V
SUMMIT VENTURE

Case No. 80-563-Civ-T-GC

_____/

ORDER

This case is before the Court upon a status conference held on August 28, 1981. At that time, representatives of the claimants' committee and counsel for the plaintiff discussed the present status of the case with the Court and made suggestions regarding discovery. The Court also reviewed a variety of pending motions. The Court has considered the motions, the memoranda attached thereto, the various suggestions of counsel regarding discovery and after oral argument the Court rules as follows:

1. A status conference will be held in this case on September 25, 1981 at 9:30 A.M. At that time the Court will announce the dates of any future status conferences to be held in this case. Seven days prior to the status conferences the parties shall file a suggestion to the Court, indicating any items for discussion.

2. The steering committee's Motion for Order Vacating the Stay on Discovery is GRANTED. The Court's July 25, 1980 discovery stay is DISSOLVED. The parties are directed to conduct discovery as proposed and agreed to by the steering committee at the August 28, 1981 status conference.

3. Plaintiff Hercules Carrier's Motion to Dismiss Delay Claims is GRANTED. The Court hereby incorporates by reference its March 16, 1981 Memorandum Opinion and Order in *In the Matter of the Complaint of Kingston Shipping Company, Inc. and Apex Marine Corporation or one or both of them for*

exoneration from or limitation of liability as owner of the S.S. Capricorn, 80-134-Civ-T-GC, and for the reasons stated therein, dismisses all of the delay claims in the instant action.

4. Plaintiff's Motion to Amend Amended Answer and Counterclaim, filed on August 4, 1981 is GRANTED.

5. Consideration of Plaintiff's Motion for Default, filed on October 1, 1980 is STAYED until plaintiff moves to renew the motion.

6. In response to the plaintiff's Motion for Clarification of Order dated December 2, 1980, counsel will only be required to serve copies of any pleadings on the members of the steering committee. It shall be the responsibility of each Steering Committee representative to inform those claimants he represents of the status of this case.

7. Attorney Edward Campbell's Motion to File a Late Claim and Answer on behalf of Johnny Woodrow Triplett is GRANTED.

8. The Court reserves ruling on claimant Willie Harold Johnson's Motion for Leave to Amend by Substitution. Steering committee representative Bill Hoppe shall report to the Court on the status of this motion at the September 25, 1981 status conference.

9. Motion for Extension of Time to File Claims and Answers filed on September 30, 1980 is MOOT.

DONE AND ORDERED in Chambers in Tampa, Florida this 2nd day of September, 1981.

/s/ George C. Carr
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In the Matter of the Complaint of KINGSTON SHIPPING CO. and APEX MARINE CORP., for exoneration from or limitation of liability as owner of the S/S CAPRICORN

Case No. 80-134-Civ-T-GC

_____/

MEMORANDUM OPINION AND ORDER

This action for exoneration or limitation of liability was instituted in the wake of the collision between the S/S CAPRICORN and the Coast Guard buoy tender BLACKTHORN which occurred on January 28, 1980. Because the collision resulted in the blockage of the main ship channel of the Port of Tampa, deep draft vessels were precluded from either entering or departing the Port until the wreckage was cleared. The owners of a number of these vessels (hereinafter referred to as "delay claimants") have filed claims in this action seeking to recover damages incurred as a result of their delayed passage into and out of the Tampa Port. Motions to dismiss the claims of the delay claimants have been filed by the Plaintiffs, and the Court heard oral argument on the Motions on February 24, 1981.

I.

The Plaintiffs contend that the delay claimants have not stated a claim upon which relief may be granted because their losses are solely economic in nature and were sustained without actual physical impact or damage. Primary reliance for this proposition is placed on the Supreme Court's decision in *Robins Dry Dock and Repair Co. v. Flint*, 275 U.S. 303 (1927), as well as a number of Fifth Circuit cases which adhere to the *Robins* rule that a negligent unintentional interference with contractual relations which results in a solely economic loss is not actionable. The delay claimants argue that (1) traditional tort prin-

ciples have replaced (or at least should replace) the *Robins* negligent interference with contract analysis; (2) the facts in the instant case are distinguishable from *Robins;* and (3) the alleged negligence of the Plaintiff gives rise to claims predicated on maritime tort, common law negligence and nuisance, and the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.*

A. *Robins* in the Fifth Circuit:

Irrespective of its wisdom, *Robins'* traditional rule of nonliabiity for negligent acts causing economic loss prevails in the Fifth Circuit. *See Louisville and Nashville Railroad Co. v. M/V Bayou Lacombe,* 597 F.2d 469 (5th Cir. 1979); *Dick Meyers Towing Service, Inc. v. United States,* 577 F.2d 1023 (5th Cir. 1978); and *Kaiser Aluminum and Chemical Corporation v. Marshland Dredging Company,* 455 F.2d 957 (5th Cir. 1972). The key issue with respect to the *Robins* decision, therefore, is whether it is applicable to the facts before the Court. It is argued by the delay claimants that direct, substantial and calculable damages were incurred by them as contrasted to the remote, speculative injury sustained by the Plaintiff time charterer in *Robins.* The delay claimants point out that recovery has been permitted by two other district courts in this Circuit in very similar circumstances in *Petition of China Union Lines, Ltd.,* 285 F.Supp. 426 (S.D. Tex. 1967) and in *In Re Lyra Shipping Co., Ltd.,* 360 F.Supp. 1188 (E.D. La. 1973).[1]

A review of the relevant case law reveals that the viability of the *Robins* rule in this Circuit is not dependent upon the Court's characterization of asserted damage claims as speculative or remote. Indeed, none of the claims which were held precluded by *Robins* in *M/V Bayou Lacombe, Dick Meyers,* or *Kaiser, supra,* were so described by the Court. Instead, the Fifth Circuit has repeatedly stated that in cases of this type "[t]he critical factor is the character of the interest harmed." *M/V Bayou Lacombe, supra,* 597 F.2d at 473, *Dick Meyers, supra,* 577 F.2d at 1025. Thus, as the Court in *Dick Meyers* was unpersuaded by the appellant's attempt to avoid the *Robins* rule by depicting its claim as the breach of a direct duty or as a private action based on a pubiic nuisance, 577 F.2d at 1025, this

[1]Cases from other jurisdictions have also been offered by the delay claimants in which the Courts have modified the strict nonliability for negligent interference with contract approach of *Robins* in favor of a more traditional tort analysis. *See,* for example, *Petition of Kinsman Transit Co.,* 388 F.2d 821 (2nd Cir. 1968).

Court is unmoved by the delay claimants' contention that their claims sound in maritime tort, common law negligence and nuisance. Finally, this Court is not compelled to follow the district court decisions in *In Re Lyra Shipping Co.* and *Petition of China Union Lines, Ltd., supra,* which have escaped full appellate review and which are, in the view of this Court, inconsistent with the most recent articulations of the *Robins* rule in this Circuit.

B. The Rivers and Harbors Act:

The delay claimants contend that in addition to the theories urged above, a cause of action against the Plaintiffs exists pursuant to the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.* Under the authority of *Lauritzen v. Chesapeake Bay Bridge nd Tunnel District,* 404 F.2d 1001 (4th Cir. 1968), it is argued that the Plaintiffs may be privately sued for obstruction of navigable waters in violation of 33 U.S.C. § 403.[2]

Review of relevant case law reveals that *Lauritzen* has been rejected in this Circuit, and that the Rivers and Harbors Act of 1899 does not create a private right of action. *Intracoastal Transportation, Inc. v. Decatur County, Georgia,* 482 F.2d 361 (5th Cir. 1973). Thus, the delay claimants' statutory theory predicated on the Act will not support their claims.

II.

The Court has reviewed all of the counts of the various delay claims, liberally construing them in favor of the delay claimants. *Conley v. Gibson,* 355 U.S. 41 (1957). Nonetheless, the Court concludes that in light of the foregoing, it appears to a

[2]33 U.S.C. § 403 provides:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

certainty that the delay claimants would not be entitled to recover under any state of facts which could be proved in support of their claims. *Cook and Nichol, Inc. v. Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971). Accordingly, the Plaintiffs' Motions to Dismiss the delay claims are GRANTED.

DONE AND ORDERED in Chambers in Tampa, Florida, this 16th day of March, 1981.

/s/ George C. Carr
UNITED STATES DISTRICT JUDGE

APPENDIX F

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

Nos. 81-6005
81-6078

D.C. Docket Nos. 80-563-CIV-T-GC
80-658-CIV-T-GC

In the Matter of the Complaint of HERCULES CARRIERS, INC., for exoneration from or limitation of liability as Owner of the M/V SUMMIT VENTURE, Plaintiffs-Appellees,

v.

STATE OF FLORIDA, et al., Claimants.

Canadian Transport Company, Clipper Maritime Co., Ltd., I.S. Joseph Company, Inc., Ultraocean S.A., Sabine Towing & Transportation Company, Claimants-Appellants.

In the Matter of the Complaint of the UNITED STATES of America, as Owner of the USCGC BLACKTHORN, for exoneration from or limitation of liability, Plaintiff-Appellee,

v.

I.S. JOSEPH SHIPPING, LTD., I.S. Joseph Company, Inc., Clipper Maritime Co., Ltd., Pell Nederland, B.V. Termar Navigation Company, Turbana Banana Corp., Gulfcoast Transit Co., ABC Containerline, N.V., Wallenius Rederierna and Motorships, Inc., A/B Helsingfors Steamship Co., Ltd., and Alianza Naviera Argentina, D.A., Marthanassa Compania Naviera, S.A., Navios Corp. and Oceanside Ltd., et al., Claimants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

JUDGMENT

ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, AFFIRMED by operation of law.

Entered: March 30, 1984
For the Court: Spencer D. Mercer, Clerk
By: /s/
Deputy Clerk

ISSUED AS MANDATE: MAY 31 1984

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
MAY 17 1984
Spencer D. Mercer
Clerk

No. 81-6005

IN THE MATTER OF THE COMPLAINT OF HERCULES CARRIERS, INC., FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OF THE M/V SUMMIT VENTURE,

Plaintiffs-Appellees,

vs.

STATE OF FLORIDA, et al,

Claimants,

CANADIAN TRANSPORT COMPANY, CLIPPER MARITIME CO., LTD., I.S. JOSEPH COMPANY INC., ULTRAOCEAN, S.A., SABINE TOWING & TRANSPORTATION COMPANY,

Claimants-Appellants.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION FOR REHEARING

(MAY 17 1984)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

APPENDIX H

STATE OF LA. EX REL. GUSTE v. M/V TESTBANK

STATE OF LOUISIANA, ex rel. William J. GUSTE, Jr., Attorney General, et al., Plaintiffs,

Ventura Trading Co., Limited, Inc., et al., Plaintiffs-Appellants,

v.

The M/V TESTBANK, Her Engines, Tackle and Apparel, Her Owners, Etc., et al., Defendants,

Partenreederei M/S Charlotta, Etc., et al., Defendants-Appellees.

No. 82-3059.

United States Court of Appeals, Fifth Circuit.

April 2, 1984

Commercial fishermen and other parties who used certain waters for business or recreation sought to recover damages allegedly incurred as result of collision between two ships and ensuing pollution of waters by chemical cargo of one of the ships. The United States District Court for the Eastern District of Louisiana, Peter H. Beer, J., 524 F.Supp. 1170, held that there could be no recovery on basis of negligent interference with contractual relations or business expectations and that commercial fishermen were entitled to recover economic losses from negligent parties, as collision of ships and resulting chemical discharge was tortious invasion interfering with special interest of commercial fishermen to use public waters to earn their livelihood. From dismissal of actions of all plaintiffs except the commercial fishermen and oystermen, appeal was taken. The Court of Appeals held that there could be no recovery by vessel owners and terminal operators who lost profits and incurred addi-

tional expenses because of shipping delays following closure of the outlet, or by various commercial businesses who suffered loss in trade because of the closure, such parties not having sustained any physical damage to their property or persons and, thus, not entitled to recover consequential economic losses under maritime law.

Affirmed.

Wisdom, Circuit Judge, concurred and filed opinion.

1. Damages 36

In maritime suit based upon alleged negligence of a defendant, a plaintiff cannot recover consequential economic losses if alleged negligence has not caused any physical damage to property or person of the plaintiff.

2. Fish 6

Navigable Waters 19

Vessel owners and terminal operators who lost profits and incurred additional expenses because of shipping delays ensuing from closure of gulf outlet by reasons of collision between other vessels and a spillage of toxic chemicals, and various commercial businesses who suffered loss in trade because of the closure, were not entitled to recover consequential economic losses, having sustained no physical damage by reason of any alleged negligence to their property or persons.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

I.

On July 22, 1980, the M/V SEA DANIEL collided with the

M/V TESTBANK in the Mississippi River Gulf Outlet. This collision resulted in the spillage of a large quantity of highly toxic chemicals that were being carried aboard the TESTBANK. Because of the spillage, federal and state authorities closed off a large area of the Outlet and nearby waterways to navigation and commercial fishing for nearly three weeks.

The owners of the two vessels filed petitions for limitation of or exoneration from liability in the United States District Court for the Eastern District of Louisiana. Various parties filed claims in the limitation action; others filed complaints against the shipowners. The numerous cases involving the collision were all consolidated in the distict court.

On December 16, 1981, the district court granted in part the defendants' motion for summary judgment and dismissed all of the plaintiffs except the commercial fishermen and oystermen. *State of Louisiana ex rel. Guste v.M/V Testbank*, E.D.La.1981, 524 F.Supp. 1170. In accordance with rule 54(b) of the Federal Rules of Civil Procedure, the district court certified this decision as a final judgment with respect to the dismissed plaintiffs.[1] Those plaintiffs, now the appellants before this Court, comprise two groups of persons or businesses that allegedly suffered injury because of the closure of the Outlet: (1) vessel owners and terminal operators who lost profits and incurred additional expenses because of shipping delays ensuing from the closure of the Outlet, and (2) various commercial businesses (e.g., seafood dealers, marina operators, and bait and tackle shops) who suffered a loss in trade because of the closure.

II.

[1] Building on the Supreme Court's decision in *Robins Dry Dock & Repair Co. v. Flint*, 1927, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290, the Fifth Circuit Court of Appeals has developed a doctrine of maritime law that controls the outcome of this case; in a suit based upon the alleged negligence of a defendant, a plaintiff cannot recover consequential economic losses if the alleged negligence has not caused any physical damage to the property or person of the plaintiff. *Akron Corp. v. M/T Can-*

[1]While this appeal was pending, the district court proceeded to adjudicate the liability of the defendants with respect to the remaining plaintiffs. On January 5, 1984, the court issued a final judgment holding that the collision was caused by the negligence of those navigating the SEA DANIEL. On January 18, 1984, the owners of the SEA DANIEL filed a notice of appeal.

tigny, 5 Cir.1983 (per curiam), 706 F.2d 151, 153; *accord Kingston Shipping Co. v. Roberts*, 11 Cir.1982 (per curiam) (summary calendar), 667 F.2d 34, 35, *cert. denied*, 458 U.S. 1108, 102 S.Ct. 3487, 73 L.Ed.2d 1369; *see also Vicksburg Towing Co. v. Mississippi Marine Transport Co.*, 5 Cir.1980, 609 F.2d 176; *Louisville & Nashville Railroad Co. v. M/V Bayou Lacombe*, 5 Cir.1979, 597 F.2d 469; *Dick Meyers Towing Service, Inc. v. United States*, 5 Cir.1978, 577 F.2d 1023, *cert. denied*, 1979, 440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455.

[2] The factual situation in the present case is in all relevant respects indistinguishable from that in *Akron* (and *Kingston*); In *Akron*, the defendant vessel grounded in the Southwest Past of the Mississippi River and thereby prevented large vessel traffic from entering or leaving that part of the river for several days. Owners and charterers of vessels blocked by the closure of the pass sued for additional expenses and other damages caused by the ensuing delays. Basing its decision on the *Robins* doctrine, the Court of Appeals affirmed the district court's grant to summary judgment for the defendant. The result was the same in *Kingston*. These cases are dispositive of the present appeal.

The decision of the district court is AFFIRMED.

WISDOM, Circuit Judge, concurring.

I write separately to suggest that the Fifth Circuit Court of Appeals reconsider this case en banc.

The Fifth and Eleventh Circuit decisions cited in the panel opinion have extended the *Robins* doctrine far beyond the actual holding of the Supreme Court in that case. In *Robins*, the propeller of a ship was negligently damaged by the operators of a shipyard. This damage caused a delay in the return of the ship to sea, and a party who had chartered the ship sued the shipyard for the charterer's economic losses that were sustained because of the delay. The plaintiff won in the trial court and on appeal to the Second Circuit Court of Appeals. The Supreme Court reversed, holding that the shipyard's damage to the propeller wronged only the owner of the ship. The Court further held that, because the charterer's contract with the shipowner was unknown to the repair yard, the contract was a matter of indifference to the yard. Therefore, negligent interference with the contract would furnish no basis for an action against the ship-

yard for profits lost by the charterer. As the Court stated,

> [the plaintiff's] loss arose only through [its] contract with the owners — and while intentionally to bring about a breach of contract may give rise to a cause of action, no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tort-feasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. The law does not spread its protection so far.

275 U.S. at 308-09, 48 S.Ct. at 135 (citations omitted).

Thus, *Robins* holds only the following: if a defendant's negligence injures party *A*, and the plaintiff suffers economic loss because it had a contract with *A*, the plaintiff has no cause of action against the defendant based on the defendant's negligence. The Fifth Circuit has extended *Robins* unnecessarily by establishing an absolute requirement of physical property damage. This extension is certainly not required by *Robins*, and the physical-damage requirement is itself artificial.[2] There is only one justification for this requirement: given that *Robins* establishes a policy of restricting the type of plaintiff who can recover for a defendant's negligence, physical property damage furnishes an easily discernible boundary between recovery and non-recovery.

In my opinion, the utility derived from having a "bright line" boundary does not outweigh the disutility caused by the limitation on recovery imposed by the physical-damage requirement. In *Robins* a great judge, Oliver Wendell Holmes, had an off-day.[3] If the Court were writing on a blank slate, I would recommend holding the defendants liable for all of the harm proximately caused by their negligence. The resulting liability in accidents such as the one here would indeed be large, but it could be handled by the insurers of the shipping companies. Placing the losses on the shippers' insurers would ensure that the

[2]For example, if a vessel negligently crashes into one marina and then sinks, thereby blocking all access to another marina, the first marina may recover all of its consequential economic losses, but the second may not.

[3]As legal historians have noted, Justice Holmes attempted throughout his career to restrict liability as much as possible. *See* G. Gilmore, *The Death of Contract* 14-17 (1974). This concern for limiting liability is out of step with contemporary tort doctrine.

shipping industry pays for all of the costs that result from the activities of the industry. Such a result would be fairer to persons who were injured by the activities of the shipping industry, and it would also induce the industry to adopt measures to minimize the harm that the industry imposes on others. The Court's concern with preventing the filing of lawsuits of a highly speculative nature, *see Akron*, 706 F.2d at 153, can be adequately addressed within the doctrinal context of traditional tort requirements of foreseeability and proximate causation.

But of course, the Court is not writing on a blank slate; we must follow *Robins*. Nonetheless, we need not extend *Robins* beyond the holding of that case. The Fifth Circuit Court of Appeals should reconsider this case en banc and repudiate the doctrine that physical property damage is prerequisite to recovery of economic losses. In a situation such as that presented by the instant case, the only parties who should be precluded from recovering are those who sustain economic losses because they have contractual dealings with persons who are directly injured by the defendant's negligence. This result is both fairer and more justifiable economically than the result mandated by *Akron*.